Financial Markets Law Committee ("FMLC")

Insurance and Pensions Scoping Forum

Date: 6 August 2019

Time: 2.00pm to 3.30pm

Location: Herbert Smith Freehills LLP, Exchange House, Primrose Street, London, EC2A 2EG

In Attendance:

Alison Matthews (Chair)	Herbert Smith Freehills LLP
Duncan Barber	Linklaters LLP
Reid Feldman (dial in)	Kramer Levin Naftalis & Frankel LLP
Martin Membery	Sidley Austin LLP
Michael Munro	CMS Cameron McKenna Nabarro Oslwang LLP
Chris Sage	Transatlantic Reinsurance Company
Jonathan Teacher	Swiss Re Management Ltd, UK Branch
Michael Wainwright	Dentons UK and Middle East LLP
Venessa Parekh	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Guest Speaker:

Sarah Turpin	K&L Gates LLP

Regrets:

George Belcher	Skadden, Arps, Meagher & Flom LLP
Peter Bloxham	
Nigel Brook	Clyde & Co LLP
Katherine Coates	Clifford Chance LLP
Beth Dobson	Slaughter and May
Hilary Evenett	Clifford Chance LLP
Charlotte Heiss	Royal Sun Alliance Insurance Group plc
Thomas Lockley	CMS Cameron McKenna Nabarro Oslwang LLP
Adam Levitt	Ashurst LLP
Geoffrey Maddock	Herbert Smith Freehills LLP

James Middleton	AIG Europe Limited
Chris Newby	AIG Europe Limited
Kees van der Klugt	Lloyd's Market Association

Minutes:

1. Introduction.

1.1. The Chair opened the meeting and asked attendees to introduce themselves.

2. Administration: FMLC's Public Education Function - Speeches (Venessa Parekh)

2.1. Ms Parekh delivered a short presentation[1] on the FMLC's Public Education Function, a key aspect of the FMLC's mission as a charity.

3. GDPR liabilities and the implications for Cyber and Directors' and Officers' Liability insurance (Sarah Turpin)

3.1. Ms Turpin introduced herself and provided a brief overview of the Data Protection Act 2018 ("**DPA 2018**"), which implements into U.K. law Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "**General Data Protection Regulation**" or the "**GDPR**"). Ms Turpin noted that non-compliance with the GDPR could have potentially serious consequences for organisations that process personal data, in particular as a result of the right of individuals to sue for compensation in the event of a data breach and the ability for regulators to impose significant fines.

3.2. Ms Turpin then gave an overview of the recent fines proposed by the U.K. Information Commissioner's Office ('**ICO**') on British Airways and Marriot International under the DPA 2018, which had run to several hundred million pounds. She noted that the level of fines were much larger than before the GDPR came into effect and were clearly intended to have both punitive and deterrent effect. In contrast, she pointed to the pre-GDPR fine of £500,000 imposed on Facebook in October 2018 for data breaches connected to the Cambridge Analytica scandal.

3.3. Ms Turpin turned to the question of whether an organisation's cyber-insurance policy would cover GDPR fines. She noted that criminal fines are typically excluded on the

[1] Please see Appendix 1

grounds of public policy but this may not extend to regulatory fines and penalties. GDPR fines could be specifically excluded by an insurance policy wording and, even if not excluded, will be subject to sub-limits or an overall policy limit which is unlikely to be sufficient to cover the level of fines recently imposed. Some policies leave open the question of coverage by providing that regulatory fines may be covered "to the extent insurable as a matter of law". Therefore, Ms Turpin observed that the question to be considered is whether GDPR fines are insurable "as a matter of law", taking into account the fact that GDPR does not address the issue of insurability and the ICO has not (to date) prohibited recovery in this manner.

3.4. Ms Turpin noted that there may be circumstances where public policy considerations would also come into play. She gave an overview of some pre-GDPR cases in which regulatory fines were imposed. In *Safeway v Trigger* [2010] EWCA Civ 1472, Safeway had attempted to recover a fine imposed by the Office of Fair Trading for breaches of competition law from its employees and directors on the basis that it was their conduct which had led to the fine being imposed. The Court of Appeal had applied the doctrine of *ex turpi causa*, and stated that Safeway, having been found criminally liable, could not seek to pass the fine on to its employees and directors (or their Directors' and Officers' Liability insurers). Ms Turpin noted, however, that the judgment was very fact-specific and the Court did not offer a general rule which could be applied to assess whether the same conclusion could be reached in the case of GDPR fines. There is therefore no definitive answer to the question of whether GDPR fines are insurable but the indications are from *Safeway*, and other cases, that the factors likely to be taking into account include whether the protection of the public would be undermined, whether the penalty is intended to have a deterrent effect and whether the undertaking is personally liable for the infringement.

3.5. Ms Turpin gave an example of a case where a data breach had led to third party litigation. She referred to the case of *Various Claimants v WM Morrisons Supermarket PLC* [2018] EWCA Civ 2239. Here, the Court of Appeal, which considered the case pre-GDPR, found there was no data breach by Morrisons, but Morrisons was found vicariously liable for the acts of their employee who had copied and published online the employee payroll data of over 100,000 employees. Around 5,000 of the employees affected brought a group action against Morrisons but the level of damages—which can include compensation for distress—has not yet been decided. It is not clear from the judgement if Morrisons had cyber insurance, although the judgement seems to indicate if Morrisons had applicable insurance, the Court would expect it to cover damages awarded as a result of third party claims. Morrisions has appealed the decision to the Supreme Court.

3.6. Ms Turpin stated that, in order to cover of third party claims, the insurance policy should include: cover for damages and legal costs; cover for breaches affecting employees, not just customers, as the legislation refers simply to data subjects; and consideration should be given to any relevant policy exclusions including retroactive dates or pre-existing problems. This is particularly important given that data breaches take some time to detect.

3.7. A discussion followed on the need for clarity in the market about what is covered by cyber-insurance and the risks of "silent cyber". An attendee noted that some firms plan for such incidents through capital programmes but substantial capital would be needed to meet GDPR fines, given the high level at which fines have recently been imposed.

3.8. Ms Turpin went on to consider the impact of GDPR on Directors' and Officers' liability insurance ("**D&O Insurance**"); noting the risk for directors of possible regulatory action, civil action and, under GDPR, criminal action where a data breach is committed with the consent or connivance of or attributable to the neglect of a director, manager or officer. She observed that civil claims involving company Directors were already common in the U.S. Similar insurability questions arise under D&O Insurance in relation to GDPR and other regulatory fines. However, D&O Insurance might be relied on to cover legal costs, PR costs, and third party claims, dependant on the terms of the policy. Such policies do not typically exclude cyber or privacy related claims but this is worth verifying.

4. Plenary discussion on recent and anticipated legislation and developments—potential areas of focus for future meetings (Alison Matthews)

4.1. Alison Matthews lead a discussion on potential areas of focus for future meetings. She began by noting that an issue which had been raised at a past meeting regarding the definition of "insurer" in the Solvency 2 and Insurance (Amendment, etc.) (EU Exit) Regulations 2019 had been resolved by the Financial Services (Miscellaneous) (Amendment) (EU Exit) (No. 3) Regulations 2019.[2] She returned briefly to an issue also discussed at a past meeting is respect of Article 16 of Directive (EU) 2016/97 on insurance distribution (recast) (the "**Insurance Distribution Directive**") but noted that this might be regarded a question for policy-makers.[3]

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[2] See minutes of the Insurance Scoping Forum meeting on 20 November 2018, available at: http://fmlc.org/insurance-scoping-forum-meeting-20-november-2018/.

[3] See minutes of the Insurance Scoping Forum meeting on 21 May 2019, available at: http://fmlc.org/insurance-scoping-forum-meeting-21-may-2019/.

4.2. Attendees noted that the remit of the Forum had been expanded to include issues relating to pensions but that the questions of most interest to them concerned pension superfunds. They also drew attention to questions regarding anti-money laundering checking in relation to pension funds since there might be a general misconception that they are exempt from such requirements.

4.3. Another attendee noted that the Prudential Regulatory Authority had published a policy statement on Credit risk mitigation and the eligibility of guarantees as unfunded credit protection.

4.4. Forum members raised the following topics for possible future discussion:

- A consultation paper by the European Insurance and Occupational Pensions Authority ("**EIOPA**") on Article 275 of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance ("**Solvency II**");
- Environmental, social and corporate governance aspects which might affect insurers; and
- Uncertainties posed by Section 377 of the Financial Services and Markets Act 2000 which allows courts to reduce the value of an insurance contract in case of insolvency.

5. Any other business[4]

5.1. No other business was raised.

[4] The next meeting of the Insurance Scoping Forum is scheduled for 2pm on 19 November 2019.

The FMLC's Public Education Function: Speeches

Venessa Parekh, Research Manager

The FMLC's charitable remit

According to the charitable remit, the FMLC has a tripartite mission:

- to *identify* relevant issues (the **radar** function);
- to *consider* such issues (the **research** function); and
- to *address* such issues (the **public education** function).

Reduced legal uncertainty and risk is in the public good; the ***radar*** and ***research*** functions are somewhat self-explanatory in this regard. The ***public education*** function is a key aspect of the FMLC's status as a charity, and is addressed in the following ways:

- All FMLC papers, presentations/speeches and correspondence are freely available via the FMLC website.
- The FMLC seeks to raise the profile of its research with those who are best positioned to implement solutions. This is achieved primarily through correspondence: the FMLC maintains active correspondence with regulatory and legislative groups around the world, particularly HM Treasury and the European Commission.
- Most FMLC events (with the exception of Patrons' events) are free to attend by members of the public.
- The FMLC also acts as a bridge to the judiciary, a task it carries out primarily by organising seminars to brief senior members of the judiciary on aspects of wholesale financial markets practice.

The Public Education Function

- Along with publications and events, the FMLC Secretariat furthers the Committee's education function by giving speeches about legal developments and issues of legal uncertainty in the financial markets.
- These speaking engagements may be at high-profile events or at a smaller gathering of an interested audience at a stakeholder firm.
- Members of the Secretariat have presented to audiences, within law firms for example, which are interested in learning about current issues facing the financial markets.
- The FMLC used to be CPD-qualified and such talks presented excellent training opportunities.
- Example of topics on which the Secretariat has presented are set out in slides below.

Brexit, FinTech and FinTech Regulation After Brexit

FMLC

Transitional Period: "Fourth" Count

- Another uncertainty arising in the context of a transiti
be a result of the U.K.'s status during the period as a
Member State.
- While the U.K. will continue to be considered a
for the purposes of intra-E.U. business, such a
not legally continue to be party to the E.U.'s
states.
- For example, U.K. CCPs may not auton
substituted compliance concessions a
the CFTC.
- It will be necessary to start from s
authorities to negotiate bilateral
each Third Country jurisdicti

FinTech Today

- At the end of 2018
cryptocurrenc
- According to a
over 2000 types o
- In March 2019, the
a trial of cross-border
central bank digital curr
- On 28 June 2019, Faceboo
"stable global cryptocurrenc
fiat currencies.
- Blockchain venture capital fund

Post-Brexit U.K. Fintech Regulation

- **HMT Consultation on Transposition of 5th Money Laundering Directive**
  - Expands regulatory perimeter to include virtual currencies and custodian wallet providers
- **FCA Cryptoassets Taskforce Report**
  - Sets out measures that the U.K. authorities intend to take regarding cryptoassets, including regulating financial instruments that reference cryptoassets and consulting on extending the regulatory perimeter for ICOs
- **FCA's Feedback Statement (FS17/4) on its Discussion Paper (DP17/3) on DLT**
  - Suggests current rules are flexible enough to accommodate use of DLT and that the FCA will continue to monitor DLT-related market developments
- **FCA granting e-money licences**
  - The FCA granted its first e-money licence to Coinbase in March 2018
- **FCA Guidance (FG16/5) for firms outsourcing to the "cloud"**
  - Lists areas of guidance that firms should consider when outsourcing to the cloud and other third-party IT services, including legal and regulatory concerns and effective access to date.

IBOR Transition (at the P.R.I.M.E Finance Conference 2019)

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SONIA

The definition of SONIA has two elements:

- (i) Statement of underlying interest
  SONIA is a measure of the rate at which i
  wholesale funds in circumstances where cre
- (ii) Statement of methodology
  On each London business day, SONIA is meas
  four decimal places, of interest rates paid on elig
  transactions.

Eligible transactions are:

- reported to the Bank's Sterling Money Market daily data
  the effective version of the 'Reporting Instructions for Form
- unsecured and of one business day maturity;
- executed between 00:00 hours and 18:00 hours UK time and
  and
- greater than or equal to £25 million in value.

Euro Rates

- EURIBOR is the rate at which Euro interbank term deposits are offered by one prime bank to another prime bank within the EMU zone, and is calculated at 11:00 a.m. (CET) for spot value (T+2).
- EONIA is a rate which represents the rates at which banks of sound financial standing in the European Union and European Free Trade Area (EFTA) lend funds in the overnight interbank money markets in Euro.
- ESTER is a rate which reflects the wholesale euro unsecured overnight borrowing costs of euro area banks. The rate is published for each TARGET2 business day based on transactions conducted and settled on the previous day (reporting date T) with a maturity date of T+1 and which are deemed to be executed at arm's length.

Brexit and finance: the legal framework

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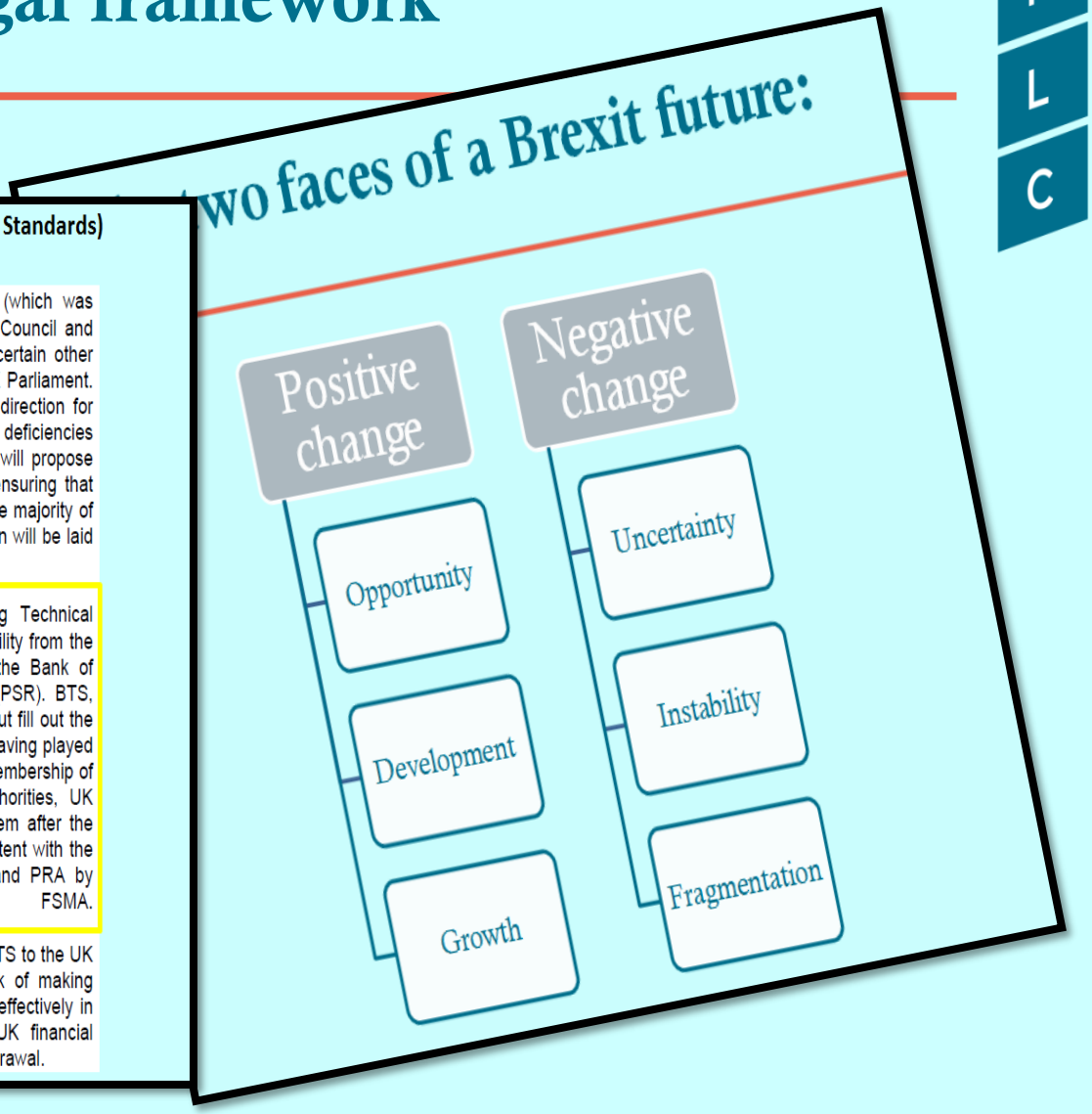
Covering note on the Financial Regulators' Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018

5 Following this model will mean that EU 'Level 1' legislation (which was developed by the European Commission and negotiated through the Council and European Parliament) and 'Level 2' legislation (apart from BTS and certain other technical elements of Level 2), will become the responsibility of the UK Parliament. This body of EU legislation includes provisions which set the policy direction for financial services, so it is appropriate that responsibility for deciding how deficiencies are fixed in this legislation should rest with Parliament. HM Treasury will propose amendments to this legislation, using the powers under the EUWB, ensuring that Parliament is able to scrutinise all of the changes. It is expected that the majority of the statutory instruments needed to correct deficiencies in this legislation will be laid under the affirmative procedure.

6 For certain EU 'Level 2' technical rules, known as Binding Technical Standards (BTS), HM Treasury proposes to transfer ongoing responsibility from the European Supervisory Authorities to the UK financial regulators – the Bank of England, the PRA, the FCA and the Payment Systems Regulator (PSR). BTS, running to several thousand pages, do not set overall policy direction but fill out the technical detail of how the requirements set at Level 1 are to be met. Having played an important role in the EU to develop these standards, through their membership of the Boards and working groups of the European Supervisory Authorities, UK regulators have the necessary expertise and resource to maintain them after the UK's exit from the EU. This allocation of responsibility would be consistent with the general rule-making responsibilities already delegated to the FCA and PRA by Parliament under FSMA.

7 As HM Treasury proposes to transfer ongoing responsibility for BTS to the UK regulators, it also makes sense that the regulators perform the task of making corrections to deficiencies in existing BTS so that these rules operate effectively in the UK at exit. HM Treasury therefore proposes to delegate to UK financial regulators the power to correct deficiencies in BTS arising from EU withdrawal.



Conflicts of laws on securities and claims: collateralisation

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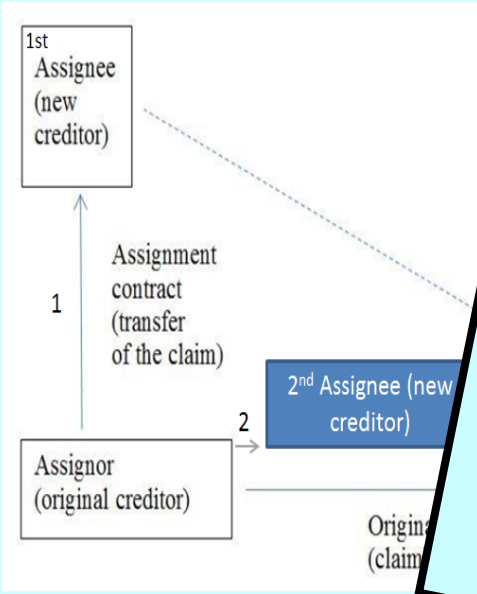
Collateralisation and the assi of claims



Collateralisation and the assignment of claims

- The Commission proposal insures that retail deposits, which re
against banks by natural person depositors
the law of the underlying
- This is the correct rule: hig
by a natural person, who is
habitual residence.
- Situations in which individua
include the taking of security
relationship, the assigning of a
association to a company on th
bank account from one spouse t
matters are excluded from the pr
lead to competing entitlements ar
residence, it may be that only the a
generate a legally certain result.

Collateralisation and the assignment of claims

- Further, with regard to bank accounts in general, it is often argued that banks should be able to take a charge over their own indebtedness *vis à vis* their clients under the law of the assigned claim and irrespective of any rule to the contrary in the law of the latter's habitual residence.
- The question arose for consideration in the U.K. courts in two cases: *In re Charge Card Services Ltd* [1987] Ch 150, where it was held to be "conceptually impossible" that banks should take a charge in these circumstances, and *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, where the House of Lords settled the question and upheld the charge. In between these case decisions, legislation was enacted in several jurisdictions with common law influence (including the Cayman Islands, Bermuda, Singapore and Hong Kong) providing for the validity and enforceability of charges of this kind, which were common at the time and continue to be prevalent as a means of taking security today.

Summary and Conclusion

- The Secretariat is happy to visit your organisation and introduce legal uncertainties in a relevant area of the financial markets.
- This helps us get reach a wider audience of stakeholders, learn about the questions occupying their time and fulfil our public education.
- If you are interested, get in touch with Debbie Hayes at: secretarial@fmlc.org or with Venessa Parekh at: research@fmlc.org